(4)

No. 98-2006

IN THE

Supreme Court of the United States

PASTOR MICHAEL CLOER AND PASTORS FOR LIFE, INC.
Petitioners,

v.

THE GYNECOLOGY CLINIC, INC.,
D/B/A PALMETTO STATE MEDICAL CENTER,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of South Carolina

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REPLY TO BRIEF IN OPPOSITION

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DECISION BELOW

Subsequent to the filing of the petition, the decision of the Supreme Court of South Carolina, reprinted in the Appendix to the Petition at 1a, has been published as *Gynecology Clinic, Inc. v. Cloer*, 334 S.C. 555, 514 S.E.2d 592 (1999)

REPLY ON STATEMENT OF MATERIAL FACTS

The respondent understandably seeks to muddle the controlling, clear factual determination of the South Carolina Supreme Court that, even if petitioners' conduct was "protected by the First Amendment" and "lawful," that would not shield petitioners from liability. Pet. App. 2a.

- **The Operative Findings of Fact by the Trial Court**

The decision below affirmed the judgment of the trial court. Pet. App. 3a. The trial court, on petitioners' reconsideration motion, concluded that its decision "perhaps lumps all of the Defendants together too readily," Pet. App. 19a. That said, the trial court identified the "two pieces of evidence [that] clearly besp[oke] an intention shared by" petitioners "to injure the business" of respondent, Pet. App. 21a. Those two pieces of evidence were:

▸ a letter placed in evidence by Pastor Cloer, written to other pastors who participated with him in Pastors for Life, Inc., in which he stated:

> "It would be difficult to overstate the importance of locating a CPC . . . next door to the abortion mill. Not only will the CPC provide a much needed service to mothers and babies in the inner city . . . but in doing so it will undercut the "business" of the abortion mill, and thereby play a key role in closing it down."

Pet. App. 20a (quoting letter).[1]

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1. The trial court omitted these opening words from the Cloer letter: "Pastors for Life is committed to making upstate South Carolina an abortion-free area and ministering to mothers and babies in need. Now we have an unprecedented opportunity to accomplish both objectives by putting a Crisis Pregnancy Center (CPC) right next door to the killing center on Laurens Road." R. 362.

▸ a videotape, dated September 3, 1994, showing Richard Cash, who was not sued by respondent, holding a picket sign which read "'Don't turn in, Keep Going,'" Pet. App. 20a, while he stood on the sidewalk at the end of the driveway shared by Pastors for Life, Inc. and respondent, *id.*[2]

- **Misstatements of Facts about Petitioners by Respondent**

Respondent make numerous significant misrepresentations about the facts in the record and focuses its attention on persons, including nonparties, before this Court. This effort apparently reflects respondent's understanding that the court below erred in concluding that a judgment of liability could, consistent with the United States Constitution, rest on evidence that petitioners engaged in constitutionally protected activities. Among the misrepresentations:

▸ that Pastor Cloer had trespassed on respondent's property, Opp. Br. at 1, when Cloer's long-abandoned participation in one Operation Rescue style blockade took place before respondent purchased the facility, R. 238.

▸ that Pastor Cloer had the goal of shutting down respondent's business, Opp. Br. at 1, when the uncontradicted evidence was that Cloer opposed legalized abortion generally, R. 235, and did not object to business existence of respondent apart from its abortion activities, *id.*

▸ that Pastor Cloer admitted that his bullhorn emitted loud and excessive noise, Opp. Br. at 1, when "loud and excessive" was a characterization made by respondent's counsel, not Cloer, R. 280.

▸ that Pastor Cloer "admits to being 'on notice' of severe ingress/egress problems at the clinic, due to the protesters blocking vision, for approximately three years," Opp. Br. at 2,

2. The trial court attributed Richard Cash's conduct to Pastors for Life even though the uncontradicted evidence at trial showed that Cash was not an employee at the time of the incident depicted in the videotape, R. 226.

when Pastor Cloer denied the truth of that factual characterization, R. 231.

▸ that Pastor Cloer admitted coordinating a protest calendar, Opp. Br. at 2, when Pastor Cloer admitted coordinating prayer services and prayer rallies, R. 241.

Respondent's factual recitation suffers from the same defect that the trial court acknowledged had been found in its initial decision: respondent "lumps all of the Defendants together too readily." Among the erroneous factual assertions in this category, respondent wrongly implicates petitioners for

▸ impediments to ingress/egress, Opp. Br. at 3-4, caused, if at all, by others, *id.*;[3]

▸ excessive noise and noise amplification problems inside respondent's facility, Opp. Br. at 4, based on testimony about the conduct of others, *id.*; and

▸ harassment and threats, Opp. Br. at 4-5, carried out, if at all, by others, *id.*

REPLY ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

A. *Madsen v. Women's Health Center, Inc.*

Respondent ignores the central fact in *Madsen v. Women's Health Center*, 512 U.S. 753 (1994). That central fact is that the injunctive relief granted in that case was premised on the bad acts of those whose conduct was enjoined, not the bad acts of others. 512 U.S. at 763 n.2; *id.* at 765 n.3. No other synthesis of *Madsen* and *Claiborne Hardware Co.* gives effect

3. Petitioners do not concede that impediments to ingress/egress were established on the record. The character of the evidence relied on by respondent is suspect. Only one clinic patron testified; on direct examination, she offered a compelling story about the difficulty she experienced getting in and out of the clinic's driveway; on cross examination, that patron admitted that her testimony was false and that one of respondent's attorneys, Marvin Quattlebaum, had assured her that it was permissible to give false testimony under oath. R. 248-64.

to the holdings in both cases, and nothing said by this Court in *Madsen* suggests an abrogation of *Claiborne Hardware Co.* In the present case, petitioners were adjudged civilly liable and the exercise of their constitutional rights restricted on evidence of that they engaged in "lawful" constitutionally protected conduct. Respondent's failed attempt to harmonize the judgment below with *Madsen* results from respondent's erroneous belief that so long as *somebody* did wrong, petitioners may be held accountable.

B. *Schenck v. Pro-Choice Network of Western New York*

Respondent's opposition completely ignores *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997). Instead, respondent cites to and relies upon the decision of the United States Court of Appeals for the Second Circuit in *Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377 (2nd Cir. 1995). Respondent seems unaware that, over two years ago, this Court reversed in part, affirmed in part, vacated in part and remanded that decision of the second circuit. *Schenck*, 519 U.S. 357.

C. *NAACP v. Claiborne Hardware Co.*

Like the decision of the South Carolina Supreme Court, respondent's argument proceeds on a defective, fundamentally flawed premise. That false premise is that the "lawful" exercise of constitutional rights to freedom of speech, of association, and of religion can support a judgment of civil liability and injunctive restrictions on the exercise of those rights. *But see NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 924 n.67 (1982) (injunctive relief must be crafted to "restrain only unlawful conduct and persons responsible for conduct of that character"); *cf. Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941) ("it is of prime importance that no constitutional freedom . . . be defeated by insubstantial findings of fact screening reality. . . . [F]ree speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the

conclusion that otherwise peaceful picketing has the taint of force").

The only ground of distinction respondent offers is that the boycott at issue in *Claiborne Hardware Co.* was "directed at all white businesses for specific political reasons," Opp. Br. at 14, while "Petitioners evinced a specific goal to put Respondent specifically out of business," *id.* That ground of distinction is without merit.

First, the undisputed evidence in the record is that petitioners' goal was to end legalized abortion in this country, not to drive respondent out of business. R. 328B-29A. To accomplish that goal, as the uncontradicted record shows, petitioners exclusively engaged in peaceful expressive activities – praying, singing, counseling, leafletting, preaching, marching, demonstrating. R. 141-42, 144, 145, 149-50, 151-57, 327-29.

Second, although the boycott in Claiborne County, Mississippi, was motivated by a specific political goal of obtaining equal treatment for the black residents of the county, both in their dealings with the government and with its white-owned businesses, *Claiborne Hardware Co.*, 458 U.S. at 899 n.26, the boycott was carried out by coercive, coordinated refusals to have commerce with those specific, white-owned businesses in the county, *id.* at 900.

The parallels between the decision below and the decision of the Mississippi Supreme Court reversed in substantial part by this Court's decision in *Claiborne Hardware Co.* are striking. Respondent fails to address those parallels squarely, because the judgment below against petitioners cannot stand in light of *Claiborne Hardware Co.*

D. *Thompson v. City of Louisville*

Respondent offers only one defense to the disparity between the judgment below and the outcome in *Thompson v. Louisville*, 362 U.S. 199 (1960); respondent contends that "the record is replete with evidence that the Petitioners targeted Palmetto State Medical Center to close down and created

danger to patrons by blocking ingress and egress from a very busy Greenville Street." Opp. Br. at 14. The problem for respondent is that the judgment below rests on the conclusion that petitioners' "lawful" conducted "protected by the First Amendment," Pet. App. 2a, can be the source of civil liability under South Carolina. Thus, no matter how respondent characterizes the record, the court below assumed that the evidence regarding petitioners consisted of proof of such "lawful" conduct "protected by the First Amendment." The court below, however, did not treat the constitutional dimension of petitioners' expressive activities as anything more significant than a speed bump on the road to an affirmance of the trial court's judgment.

E. *New York Times Co. v. Sullivan*

Respondent misses the mark regarding the duty of a reviewing court "in proper cases" to "review the evidence to make certain that [constitutional] principles have been constitutionally applied," *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964). Opp. Br. at 14. The striking conclusion of the South Carolina Supreme Court cannot be winked. Under respondent's approach to *New York Times Co.*, there is no constitutional difficulty in premising civil liability and restrictions on constitutional freedoms on evidence of the exercise of those constitutional freedoms.

F. The Public Forum Cases

Again, respondent misses the mark. In this case, there is no basis in fact for asserting that petitioners have engaged in a course of unlawful conduct. *Supra* at 1-3 (discussing facts in record). Nonetheless, the court below affirmed the entry of an injunction that bars petitioners from engaging in the exercise of constitutionally protected rights of expression. Pet. App. 1a-3a; *id.* at 8a. That injunction works an absolute prohibition on "picketing[and] demonstrating" in the affected area, Pet. App. 8a. Consequently, under the Public Forum Doctrine cases, *see, e.g.*, *United States v. Grace*, 461 U.S. 171, 177 (1983), the

court below should have considered whether the injunctive restrictions were "narrowly drawn to accomplish a compelling governmental interest," *id.* But respondent argues that the injunction serves "significant governmental interests." Opp. Br. at 8. Thus, respondent impliedly concedes that the appropriate scrutiny was not brought to bear on the injunction.

II. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE TEXAS SUPREME COURT.

Respondent fails to show that the decision below is not in conflict with the decision of the Texas Supreme Court in *Valenzuela v. Aquino*, 853 S.W.2d 512 (Tex. 1993). The precise conflict between the decision below and the decision in *Valenzuela* is on the question of whether a permanent injunction restricting the exercise of constitutionally protected rights of expression may be sustained without a constitutionally sufficient finding of legal liability. Compare Pet. at 22-24 with Opp. Br. at 6-7. In Texas, it may not, *Valenzuela*, 853 S.W.2d at 514 n.2; in South Carolina, it may, Pet. App. 2a-3a.

III. THE SOUTH CAROLINA RELIGIOUS FREEDOM ACT IS A SUFFICIENT INTERVENING DEVELOPMENT OF CIRCUMSTANCE OR LAW TO WARRANT THIS COURT'S ORDER GRANTING THE PETITION, VACATING THE JUDGMENT BELOW, AND REMANDING THE CASE FOR FURTHER CONSIDERATION.

Respondent contends that the "South Carolina Religious Freedom Act," S.C. Code §§ 1-32-10 *et seq.* (SCRFA), "in no way effects [sic] the judgment *in that the injunction complies with the SCRFA*." Opp. Br. at 15 (emphasis added). Respondent's implication is plain: the judgment below and the injunction it affirms are subject to review under the South Carolina Religious Freedom Act. Respondent simply satisfies itself, without any court having considered the question, that the judgment and the injunction survive the level of scrutiny mandated by SCRFA. The settled practice of this Court,

however, is that an intervening change of circumstance or law warrants the entry of an order granting the petition, vacating the judgment below, and remanding for further consideration in light of the changed circumstance. *See* Pet. at 28 n.9 (and accompanying text). Thus, respondent has failed to demonstrate why the petition should not be granted, the decision below vacated, and the matter remanded for further consideration prior to review in this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the petition and either summarily reverse the decision of the Supreme Court of South Carolina or set the matter down for consideration on the merits.

In the alternative, this Court should grant the petition, vacate the decision below, and remand the case for further consideration in light of the newly enacted SCRFA.

Respectfully submitted,

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